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DEC 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR FRANCIS L. HAWES.

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PETITION FOR CERTIORARI FILED FEBRUARY 4, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

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No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED,

Petitioner,

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FRANCIS L. HAWES AND RAYMOND D. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT FRANCIS L. HAWES.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia is reported in 132 F. (2d) 569, 76 U. S. App. D. C. 308.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was dated October 12, 1942 (R. 39). The

petition for rehearing was denied November 4, 1942 (R. 39, 40). The mandate was issued January 7, 1943. Judgment on the mandate was entered February 4, 1943. The petition for a writ of certiorari was filed February 4, 1943. The jurisdiction of this court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and paragraph c of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States amended to May 26, 1941. Certiorari was allowed April 5, 1943.

Statement.

Respondent deems it necessary under authority of Rule 27 (d) to supply a full statement.

This case was brought on March 3, 1941 to the United States Court of Appeals for the District of Columbia on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of petitioner. On June 4, 1941 the respondent, Francis L. Hawes, filed a motion to dismiss the appeal in the Court of Appeals upon the ground among others, that it was not noted in time (R. 11). Certain exhibits were attached to this motion, but they are not in the transcript in this court. Opposition was filed by petitioner (R. 18). A reply which is not in the transcript with an attached exhibit D (the same as Exhibit C attached to the renewal motion R. 27) was filed by respondent to the opposition. On November 13, 1941 this motion was denied without prejudice to the respondent's right to renew the same upon the single ground mentioned at the argument on the merits (R. 22). The motion was renewed (R. 23) and certain exhibits were attached thereto (R. 26, 27, 29, 30, 31). No opposition was filed by petitioner. The motion was argued at the time of the argument on the merits (R. 32). On October 12, 1942

the Court of Appeals granted the motion to dismiss (R. 39).

The facts pertinent to the grounds for the renewed motion to dismiss supported by the record, the uncontradicted exhibits and references to the transcript follow: Petitioner's complaint was filed in the District Court of the United States for the District of Columbia on December 2, 1939 (Tr. 1). The hearing of the case was had on April 19, 1940, with both parties introducing evidence and presenting testimony (Exhibit C, R. 27). The case was taken under advisement and on April 24, 1940 oral pronouncement was made in the presence of both parties in open court by the trial justice of the findings of fact, conclusions of law and nature of the decree to be drawn (Exhibit C, R. 27, 28). On May 1, 1940 petitioner handed in proposed written findings of fact and at the same time, in the presence of petitioner and the trial justice in his chambers, respondent handed in proposed written findings of fact, conclusions of law and decree for signature of the court (Exhibit C, R. 27, 28). On May 1, 1940, the same day, the trial judge, after study, indicated in the presence of counsel for both parties that it would then and there sign the findings of fact, conclusions of law and decree submitted by respondent. Mr. Johnson, counsel for the petitioner, objected and obtained a few days to submit further findings, which, however, were never submitted (Exhibit C, R. 27, 28). The respondent's proposed findings of fact, conclusions of law and decree dismissing the complaint, which had been retained by the court from May 1, 1940, were signed and filed by the court on May 7, 1940 (Tr. 32, 34; R. 1, 5). Petitioner's proposed findings of fact, which had also been retained by the court from May 1, 1940 but not adopted by it, were filed by the court on May 7, 1940 (R. 1).

This judgment was noted in the clerk's Civil Docket on May 7, 1940 as required by Rule 79 (a) of the Federal Rules

of Civil Procedure (R. 1). Notice of appeal was not filed until June 3, 1940 by petitioner (R. 1, 5).

No note in the Civil Docket of the mailing as required by Rule 77 (d) appears in the record (R. 1). However, the clerk's affidavit showed that he made a large letter "N" in the Day Book of Civil Division No. 3 beside the final decree entered in the book, which signified that notice of the entry of the final decree of May 7, 1940 was written up for mailing to the parties therein (R. 8 and 9, referred to in the renewed motion to dismiss at R. 25). It has been the uniform custom in the District Court and most courts for a messenger to pick up such notices and place them in the mail. There was no direct evidence that it either was or was not mailed in this case. Such facts are virtually impossible of exact proof but the presumption is that the custom prevailed.

In addition to the record notice of entry of the judgment in the Civil Docket there was advertisement of a foreclosure sale of the property involved in the suit to take place on June 4, 1940, which appeared publicly in the newspaper May 13, 18, 25, 28 and June 3, 1940. This was disclosed by the exhibits attached to the renewed motion to dismiss in the Court of Appeals (Exhibits E, F, at R. 30, 31). Publication of the entry of the decree dismissing suit appeared in the legal record of a public newspaper on May 8, 1940 (Tr. 48, referred to in the renewed motion to dismiss at R. 25). On June 3, 1940, the day before the scheduled foreclosure sale (R. 30), petitioner's attorney hinted that he was going to appeal the case. Respondent's attorney told him that petitioner could not apeal, that it was too late. Whereupon petitioner's attorney rejoined that petitioner had forty days from the date of the entry of judgment and that he did not know about the twenty day limit for taking appeals (See full statement in Exhibit C, at R. 27, 28).

The period for noting an appeal from the judgment of May 7, 1940 allowed by the rules of the Court of Appeals in effect at that time expired with no notice of appeal filed (R. 1). Petitioner filed a notice of appeal after the time had expired (R. 1, 5).

On June 6, 1940, after the time for appeal had expired and after petitioner had noted his appeal, petitioner filed a motion in the District Court to enter judgment and direct the clerk to notify parties (R. 6). This motion (R. 6) set forth the grounds that the clerk failed to enter the day or month of the judgment and that the clerk had failed to notify the parties of the action of the court. The motion was opposed by the respondent in amended points and authorities filed on June 7, 1940, which opposition included the reason that a foreclosure sale had been held in reliance on the finality of the judgment (Tr. 39, referred to at R. 13). The trial judge directed petitioner to withdraw this motion, which he failed to do (Exhibit C, R. 27, 29). Petitioner's allegation on page 2 of the petition for certiorari that the motion was heard in open court on June 13, 1940 is misleading and incorrect. Respondent was not notified of a hearing of any kind, on that date, had no knowledge of any such hearing and was not present. (Exhibit C, R. 27, 29; R. 35). The motion remained on the calendar and was subsequently heard and dismissed by another judge of the District Court on June 24, 1940 (R. 10). No appeal was taken by petitioner from or after the dismissal, which was entered on the Civil Docket (R. 1) in accordance with Rules 58, 79 (a) and 77 (d) of the Federal Rules of Civil Procedure.

Meanwhile, on June 13, 1940 the trial judge, in the absence of respondent and without notice or opportunity for respondent to be heard, entered an order vacating the judgment of May 7, 1940 (R. 7, 35; Exhibit C at R. 27, 29). The reason stated in the order was that the clerk failed to serve a notice of the entry of judgment by mail and failed

to make a note in the docket of the mailing in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure (R. 7). The record does not show the filing of any motion or notice in writing to vacate the judgment of May 7, 1940 either before or after the expiration of the twenty day period for noting an appeal; the only entry in the record concerning vacation of the judgment of May 7, 1940 is that of the order of June 13, 1940 vacating the judgment (R. 1. Exhibit A at R. 26). On the same day, June 13, 1940, the trial judge, in the absence of respondent and without notice or opportunity for respondent to be heard, signed and filed a second judgment in the same terms as the one of May 7, 1940 (R. 7; Exhibit C, R. 27, 29). Petitioner on page 2 of his Statement in his petition for certiorari admits to this court that he took part in the ex parte proceedings.

On June 14, 1940 petitioner filed a notice of appeal from the judgment of June 13, 1940 (R. 8). Respondent filed a motion in District Court on June 24, 1940 to reconsider the order vacating the judgment of May 7, 1940 (R. 8, Tr. 44) with the above mentioned affidavit of the clerk (R. 9) and exhibit of the publication of the entry of the decree of May 7, 1940 in the public newspaper (R. 8, Tr. 48). No opposition was filed by petitioner. This motion was heard by the trial judge, who overruled it stating that he did not wish to be in the position of cutting off petitioner from an appeal from his decision (Exhibit B at R. 27). No order overruling this motion was entered by the trial judge (Exhibit A at R. 23). Respondent's attorney had drawn up an order overruling said motion when it became evident that the record was incomplete, and presented this order to petitioner's attorney for signing by the court and filing (Exhibit B at R. 27), which signing and filing was never consummated.

In conclusion, these uncontradicted facts were apparent of record or set forth in support of the renewal of the

motion to dismiss in the Court of Appeals in the form of exhibits attached thereto, including written certificates by respondent's counsel of record and clerks of the court, or references to the transcript and exhibits therein from the District Court.

Summary of Argument.

A.

The United States Court of Appeals for the District of Columbia properly dismissed the appeal of the petitioner for failure to file a notice of appeal within a 20 day period from the entry of judgment on May 7, 1940 in the District Court of the United States for the District of Columbia. Rule 10 of the Rules of the Court of Appeals provided that no judgment of the District Court of the United States for the District of Columbia or of any justice thereof was to be reviewed by the Court of Appeals unless the appeal was taken within 20 days after the judgment complained of had been made or pronounced.

Petitioner's contention that Section 8 (c) of the Act of February 13, 1925, 28 U. S. C. A. 230 (43 Stat. 936, c. 229) allowing three months for appeal to a circuit court of appeals, encompassed the United States Court of Appeals for the District of Columbia is without foundation. Whatever the parallelism it is not a circuit court of appeals.

The taking of appeals from the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia was governed by Rule 10 of the court, in effect to February 1, 1941, as amended December 16, 1936 under authority of the Act of February 9, 1893 (C. 74, 27 Stat. 434) and supplemented by the Act of July 30, 1894 (C. 172, 28 Stat. 160; C. 2, Section 25, Title 18, The Code of the District of Columbia). The Act of 1894 did not repeal the Act of 1893;

the authority to make rules for the *taking* of appeals was the same as that of the Act of 1893 to make rules *for the time and method* of the entry of appeals.

This power has not been abrogated either by express or implied repeal in the Judiciary Act of 1925, above mentioned. The Court of Appeals of the District of Columbia was specifically mentioned in that act where Congress intended, and perusal of the whole legislation will show that Congress did not refer to said court as a circuit court of appeals. Section 8 (c) thereof did not mention the Court of Appeals of the District of Columbia.

B.

There is nothing in either the Rules of the United States Court of Appeals for the District of Columbia or in the Federal Rules of Civil Procedure providing for an extension of time for noting an appeal from a judgment. Such action is prohibited by Rule 6 (b) of the Federal Rules of Civil Procedure. The Court of Appeals properly applied these rules, its own rules and the applicable decisions of this court in deciding that the time for appeal must not be extended in this case.

Petitioner, contrary to his statement that the court was responsible for delay (found on page 7 of the brief in support of his petition for certiorari), prevented the trial judge from signing the decree in petitioner's presence on May 1, 1940. He requested a postponement for a few days within which to file additional findings of fact, which were never filed (Exhibit C, R. 27, 28). This exhibit, attached to the renewal of the motion to dismiss in the Court of Appeals, was undenied there, and the Court of Appeals found as a fact in its decision that after the hearing in the District Court proposed findings were presented by both parties to the trial judge on May 1, 1940 (R. 33). On May

7, 1940 the trial judge signed respondent's proposed findings of fact, conclusions of law and decree from among the papers left with him on May 1, 1940 (Tr. 32, 34; R. 1). This was the action he stated on May 1, 1940 he would take unless petitioner filed more suitable findings within a few days (Exhibit C, R. 27, 28). Thus there was a period of one week during which petitioner should have filed further proposed findings, and not having done so, he must have expected the decree at the end of that time. The judgment was properly noted in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) of the Federal Rules of Civil Procedure.

Compliance with Rules 58 and 79 (a) of these rules was all that was necessary to make the judgment effective. Failure to comply with Rule 77 (d) in this case did not destroy its effectiveness. The period for noting an appeal ran from this judgment as entered. Petitioner failed to note an appeal within the time for appeal allowed by the Rules of the Court of Appeals. His notice of appeal filed after this time on June 3, 1940 (R. 1, 5) was too late.

Petitioner's attempt to gain more time within which to note an appeal by filing the motion of June 6, 1940 to enter judgment and direct clerk to notify parties (R. 6), on the grounds that the judgment had not been entered properly and that the clerk had failed to comply with Rule 77 (d), was of no avail. Respondent filed an opposition to this motion on June 7, 1940 (R. 1, Tr. 39). The motion was dismissed by order of the District Court June 24, 1940 (R. 1, 5).

Meanwhile, the petitioner and the trial court had bypassed the respondent (Exhibit C, R. 27, 29) in an attempt to enlarge or recall the time for appeal by vacating the judgment of May 7, 1940 on June 13, 1940 on the grounds of the failure of the clerk to comply with Rule 77 (d), (R. 7), and the reentry on June 13, 1940 of a judgment in the same

terms as the one of May 7, 1940 (R. 7). This was unwarranted and improper. Petitioner noted an appeal from this void judgment on June 14, 1940 (R. 8). Respondent had no notice of this and did not learn of it until after it had happened (Exhibit C, R. 27, 29). The device was ineffective to extend the time for noting an appeal and was a violation of Rule 6 (b), which prohibits enlargement of the period for taking an appeal.

There was no clerical mistake in the judgment of May 7, 1940 (R. 5) and no authority in Rule 60 (a) for the vacation of the judgment or the entry of a subsequent judgment similar in form (R. 7); nor did that rule provide for an enlargement of the time for an appeal. The alleged omission in failing to mail notice and the failure to make a note of the mailing in the Civil Docket was that of the clerk. In the facts of this case there was no motion filed or granted under authority of Rule 60 (b) for relief from a judgment, order or proceeding on the grounds of mistake, inadvertence, surprise or excusable neglect of petitioner or his attorney (R. 1, Exhibit A at R. 26, Exhibit C at R. 27, 29). Rule 60 (a) and (b) did not contemplate affecting appellate proceedings or enlargement of the period for taking an appeal. At no place in the Federal Rules of Civil Procedure where the period for taking an appeal was mentioned was a district court given the power to enlarge or affect the period for taking an appeal within the time prescribed by law. See Rules 73 (a) and 6 (b). Nor did the Rules of the Court of Appeals give that court or the District Court such power. It has been held many times over in decisions of this court that the time for appeal may not be extended.

The Court of Appeals properly granted respondent's motion to dismiss petitioner's appeal.

ARGUMENT.

A.

Authority of the United States Court of Appeals for the District of Columbia to fix by rule a different time for reviewing judgments of the District Court of the United States for the District of Columbia than that prescribed for bringing any judgment before a Circuit Court of Appeals.

History of Legislation.

A brief history of congressional legislation for the courts of the District of Columbia in connection with legislation for courts of the United States generally discloses that the Act of February 27, 1801 (2 Stat. 103) created a Circuit Court of the District of Columbia and conferred on it all powers by law vested in circuit courts of the United States. The Act of March 3, 1863 (C. 91, 12 Stat. at L. 762) abolished the Circuit, District and Criminal Courts of the District of Columbia and established the Supreme Court of the District of Columbia with the right of appeal from the special term of the court to the general term. The court in general term was required to adopt such rules as it thought proper to regulate the time and manner of taking appeals. The Act of March 3, 1891 (C. 517, 26 Stat. 826) to establish circuit courts of appeals throughout the country provided that no appeal was to be taken except within six months after the entry of judgment.

Creation of the Court of Appeals of the District of Columbia.

The Court of Appeals for the District of Columbia was established by the Act of February 9, 1893 (C. 74, 27 Stat. 434), which provided in Section 6 that the court was to make rules it deemed necessary for the transaction of business

and for the time and method of the entry of appeals from the Supreme Court of the District of Columbia. In pursuance of the mandate of the statute the court promulgated Rule IX (21 W. L. R. 275, 278, 1 App. D. C. V, XIV), which limited the time for taking appeals to a twenty-day period after the judgment complained of had been made or pronounced.

The Act of February 9, 1893 was amended by the Act of July 30, 1894 (28 Stat. 160), which expanded the powers of the Court of Appeals for the District of Columbia and provided in Section 6 (Title 18, C. 2, Section 25 of the Code of the District of Columbia, 1929) that the court make rules and regulations necessary for the transaction of its business and the taking of appeals to said court. It was given further power generally to regulate all matters relating to appeals in the court below and in the Court of Appeals. The Court of Appeals by virtue of the acts of Congress promulgated Rule 10 on September 29, 1894, (4 App. D. C. V, XVII), which was the same as its former Rule IX.

It may well be argued that the refusal of Congress in the supplementary legislation of 1894 to withdraw the power of the Court of Appeals of the District of Columbia to fix by court rule the time for entry of appeals, exercised by the Court in its Rule IX, *supra*, and its reaffirmance of that power by directing the court to make rules for the taking of appeals is a clear indication of the intent of Congress to leave this power in the court. This rule-making power was specifically upheld by the Supreme Court of the United States in the case of *Ex Parte Dante*, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579, decided on April 28, 1913, which recited that the Act of Congress of February 9, 1893 created and conferred power to make rules, that Rule 10 was promulgated providing for no appeal unless taken within 20 days after judgment and that such rule

was still in force and was the only rule governing the time within which appeals from the Supreme Court of the District of Columbia were to be taken to said Court of Appeals. Section 6 of the Act of 1894, *supra*, was thus read into the Act of 1893, *supra*.

THE EFFECT OF THE JUDICIARY ACT OF 1925.

When Congress in the Act of February 13, 1925 (C. 229, 43 Stat. 936) amended the Judicial Code and further defined the jurisdiction of the circuit courts of appeals and stated other purposes it must be presumed to have had knowledge of the existence of the Rules of the Court of Appeals of the District of Columbia interpreting the Acts of 1893 and 1894 as giving that court power to limit the time for taking appeals to 20 days from a judgment of the Supreme Court of the District of Columbia. Its express intention to amend only Sections 128, 129, 237, 238, 239 and 240 of the Judicial Code further demonstrates this; since none of those Judicial Code sections applied to the Court of Appeals of the District of Columbia. *Ex Parte Dante*, *supra*, involving the dismissal of an appeal from a judgment dated June 22, 1912, was decided after the enactment of the Judicial Code of 1911.

Congress in enacting the Judiciary Act of 1925 furnished abundant evidence that it did not intend the Court of Appeals of the District of Columbia to be governed by Section 8 (c) prohibiting appeals more than three months after judgment. This section mentioned only "a circuit court of appeals". Sections 239, 240 (a) and (c), 5 and 8 (b) used the terminology "in a circuit court of appeals, or in the Court of Appeals of the District of Columbia". Section 6 (a) applied to a circuit court of appeals, while 6 (b) provided specifically for the Court of Appeals of the District of Columbia. Section 5 of the Act of 1925 applied only to bankruptcy cases, for it was the clear intention of Con-

gress to specifically mention the Court of Appeals of the District of Columbia at each point where the act applied to that court. Petitioner's argument concerning Section 5 on page 10 of his brief omits consideration of this factor. See also 42 Harvard L. R. 2, note 3.

Section 2 of the Act of 1925 refers only to "a circuit court of appeals" in enumerating statutes such as the Federal Trade Commission Act, appeals from which are included among the cases covered by Sections 239 and 240 of the Judicial Code. This court in *Federal Trade Commission v. Klesner*, 274 U. S. 145, 71 L. Ed. 972, 47 S. Ct. 552, has held that the Federal Trade Commission Act (38 Stat. 717), conferring jurisdiction in that act on circuit courts of appeals to enforce commission orders, included by interpretation the Court of Appeals of the District of Columbia. Congress was held not to intend that there should be no means of enforcement of that act in the District of Columbia. The situation was different in *United States v. Burroughs*, 289 U. S. 159, 77 L. Ed. 1096, 53 S. Ct. 574, in which this court held that a statute authorizing direct appeals from district courts to the Supreme Court of the United States in certain criminal cases did not apply to the Supreme Court of the District of Columbia, which was governed by a statute providing generally for all appeals to be taken to the Court of Appeals for the District of Columbia. The opinion stated further that implied repeals were not favored, and if effect could reasonably be given to both, the presumption was that the earlier statute was intended to remain in effect. (31 Stat. 1189, ch. 854, Section 1, March 3, 1901, provided that all general acts of Congress not locally inapplicable in the District of Columbia or by their terms applicable to the District of Columbia in force on March 4, 1901 remained in force except insofar as the same were inconsistent with or replaced by subsequent legislation.) The court further stated that Title

18, Section 43 of the *District of Columbia Code*, providing that the Supreme Court of the District of Columbia was to be deemed a court of the United States, was not such a designation as to constitute it a district court; and this statute giving it the same jurisdiction and powers as district courts of the United States, which satute was held to be applicable to appellate proceedings also, did not make it a district court of the United States. Therefore, while the Court of Appeals may have the powers of a circuit court of appeals, it is not a circuit court of appeals. For the proposition that statutes designed specifically for the District of Columbia prevail over federal statutes of general application where the two are inconsistent, see *Johnson v. U. S.*, 38 App. D. C. 347, 225 U. S. 405, 32 S. C. 752, 56 L. E. 1142; *Kleindienst v. U. S.*, 48 App. D. C. 190; *O'Brien v. U. S.*, 69 App. D. C. 135, 99 F 2d 368. In *Britton v. Maryland Casualty Co.*, No. 8321 in the United States Court of Appeals for the District of Columbia, a motion to dismiss was granted without opinion despite the making of the same argument by appellant that petitioner makes here.

In this case the Acts of 1893 and 1894, *supra*, in conjunction with Rule 10 of the Court of Appeals, which rule has the effect of law, were the local legislation which prevailed over the general legislation in Section 8 (c) of the Judiciary Act of 1925.

For the policy and reason underlying the intention of Congress to permit this difference between circuit courts of appeal and the United States Court of Appeals for the District of Columbia we may consider several interesting factors. The District of Columbia has been treated separately in a number of legislative matters dealing with the same or similar subject matter found in federal statutes generally and it has been given a separate code of laws. See *Johnson v. U. S.*, *supra*; *Kleindienst v. U. S.*, *supra*;

and *O'Brien v. U. S., supra.* The courts of the District of Columbia have a peculiar legislative history as discussed above and have been looked upon as being created under authority of Article II, Section 10 of the Constitution as well as Article III of the Constitution. *Keller v. Potomac Electric Company*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445. The work of the Court of Appeals in sitting as an administrative tribunal must have had some influence on legislation for it. The jurisdiction of the District Court of the United States for the District of Columbia for a long time embraced cases involving more than one thousand dollars. This has only recently been changed so that the jurisdiction in that respect conforms to the three thousand dollar minimum of district courts of the United States. See Municipal Court Act, Public law 512, Sec. 4 (a), approved April 1, 1942, 70 W. L. R. 316, p. 320. It is interesting to note that in the Rules of the Municipal Court of Appeals for the District of Columbia, effective September 13, 1942, Rule 27 (a) allowed only ten days from the date of the judgment to note an appeal. The rule was promulgated under general authority in Sec. 7 (b) of the act to regulate all matters relating to appeals, which was analogous to Sec. 6 of the Act of July 30, 1894, *supra.* This demonstrates the tendency to effect an early termination of legislation involving smaller amounts of money. We can believe that Congress had this in mind when it did not include the Court of Appeals for the District of Columbia in Section 8 (c) of the Judiciary Act of 1925.

The point at which litigation shall become final can be determined by the legislative power of the state, for the right of appeal is not essential to due process of law. *Standard Oil Company v. Missouri*, 224 U. S. 270, p. 287, 32 S. Ct. 406, 56 L. Ed. 760. Where the legislature gives this power to the courts under their rule making power it must be exercised properly with a view to terminating litigation at

a definite point. Litigation at its best is burdensome and society must protect itself from uncertain, lengthy and highly technical protagonism.

Status of United States Court of Appeals for the District of Columbia and Rule 10.

The Laws of 1893 and 1894, *supra*, were not embraced within the Judiciary Act of 1925, which limits the time for taking appeal to "a circuit court of appeals". In *O'Donoghue v. United States*, 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740, this court said that Congress could establish inferior federal courts in the District of Columbia under the authority of Article III of the Constitution of the United States and that they are courts of the United States. It is not required to make them district or circuit courts, *Lockerty v. Phillips*, 63 S. Ct. 1019. *United States v. Burroughs*, *supra*, stated the distinction between district courts and courts of the United States, which latter phrase included the Supreme Court of the District of Columbia.[1] In any event it is not necessary to make this distinction when the organic act establishing the Court of Appeals of the District of Columbia gave it power to govern the taking of appeals and this power has not been expressly withdrawn. Regarding *Alaska Packers v. Pillsbury*, 301 U. S. 174, cited by petitioner, there was not a separate organic act creating the Court of Appeals in the Ninth Circuit and giving it the rule-making power that was given the Court of Appeals of the District of Columbia. There was no doubt that it was a circuit court of appeals which was governed by Section 8 (c) of the 1925 Judiciary Act fixing the method of applying for appeals.

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[1] Name changed to District Court of the United States for the District of Columbia (June 25, 1936, 49 Stat. 1921, c. 804).

The Act of June 7, 1934 (C. 426, 48 Stat. 926, Public No. 298) specifically mentioned the organic Act of 1893 establishing the Court of Appeals for the District of Columbia and provided that it was to be amended to change the name of the court to the United States Court of Appeals for the District of Columbia. Thus Congress recognized that this court had been created and had existed apart from circuit courts and that the Judiciary Act of 1925 had no effect on it to make it a circuit court of appeals. The District of Columbia is not one of the named circuits set forth in all the legislation of Congress establishing the various circuits. That Congress in Title 11 U. S. C. A., Section 47 (a) mentioned "circuits courts of appeal of the United States and the United States Court of Appeals for the District of Columbia" while in subsection (c) and in Section 48 (a) it used the words "Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia" is indicative of a clerical error only on the face of the legislation and, of course, does not constitute it a circuit court of appeals. The Federal Rules of Civil Procedure remove any vestige of doubt on this score in Rule 81 (d) which states that when reference is made in the rules to a circuit court of appeals, the reference includes the United States Court of Appeals for the District of Columbia, thus indicating that there is a difference. This is further borne out by T. 28, U S. C. A., Section 17 (56 Stat. 1094, as amended December 29, 1942). This statute, for certain specific purposes only, deemed the District of Columbia to be a judicial circuit, namely, for the assignment of justices to overburdened courts. The justices of the United States Court of Appeals for the District of Columbia were by this statute and for these certain purposes deemed to be circuit judges.

This court may take judicial notice that the United States Court of Appeals for the District of Columbia, since the Judiciary Act of 1925, has continued to promulgate and use its Rule 10, limiting the time for taking appeals to a twenty day period, under the authority of the Acts of 1893 and 1894 throughout the years. The Rules of the United States Court of Appeals for the District of Columbia were revised December 1, 1927. In the reprint of December 16, 1936 Rule 10 provided:

> "Time and Manner of Allowing Appeals to This Court—
>
> 1. No order, judgment or decree of the District Court or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the order, judgment or decree complained of shall have been made or pronounced."

In the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 F. 2d 526, and in promulgation of its rules effective February 1, 1941, 72 App. D. C. 409, the court recognized its power. Legislation once judicially or even administratively interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord and not at variance with the legislative intention. *Swigart v. Baker*, 229 U. S. 187, 57 L. Ed. 1143, 33 Sup. Ct. 645; *Bardwell v. Petty*, 52 App. D. C. 310, 286 F. 772; *United States ex rel. Queen v. Alvey*, 182 U. S. 456, 45 L. Ed. 1369, 37 S. Ct. 741; *Chewning v. District of Columbia*, 73 App. D. C. 392, 119 F. 2d 459. Petitioner did not raise the question until he filed a petition for rehearing of the Court of Appeals decision.

While Rule 10 of The General Rules of the United States Court of Appeals for the District of Columbia, effective

February 1, 1941, allowed 30 days for noting an appeal. Rule 10 of the Court of Appeals allowing less time for taking an appeal was in effect until January 31, 1941 and was the law which governed this case.

Thus, in conclusion of this phase of the argument, respondent contends that the United States Court of Appeals for the District of Columbia had ample statutory authority to promulgate Rule 10 limiting the time for taking appeals to a twenty day period after judgment entered in the District Court of the United States for the District of Columbia.

B.

The Court of Appeals properly decided under the Federal Rules of Civil Procedure that a judgment was effective when noted in the civil docket in accordance with rules 58 and 79 (a) and that the device of the trial judge to extend the time allowed for appeal by Rule 10 of the Court of Appeals was ineffective.

ORIGINAL JUDGMENT FINAL.

As set forth in the Statement, supra, petitioner had a full hearing of the case before the trial court on April 19, 1940. He was present on April 24, 1940 when the trial judge made oral pronouncement of the findings of fact and conclusions of law (Exhibit C, R. 27) and directed the parties to prepare proposed findings of fact, conclusions of law and a decree. The parties were later afforded on May 1, 1940, an opportunity to hand in proposed findings (Exhibit C, R. 27, 28). Petitioner and respondent through counsel were present on May 1, 1940 in the trial justice's Chambers when the judge decided then and there to sign respondent's proposed findings of fact, conclusions of law and decree dismissing suit rather than petitioner's proposed findings of fact (Statement, supra). Petitioner

effectively prevented this by requesting a few days within which to submit additional findings of fact and his conclusions of law (Exhibit C, R. 27). Petitioner was afforded due process of law, *Morgan* v. *United States*, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773. When petitioner failed to avail himself of this opportunity he must have known that the decree left in the possession of the trial judge would be signed at the expiration of those few days. The trial court held the petitioner's proposed findings of fact and respondent's proposed findings of fact, conclusions of law and decree until May 7, 1940 when he signed and filed the said papers submitted by respondent and filed the said findings of fact submitted by petitioner (R. 1, 5, Tr. 32, 34). If petitioner had ever intended to file additional findings of fact or conclusions of law promptly he would have discovered the entry of the judgment filed and noted in the Civil Docket on May 7, 1940 (R. 1, 27, 28). Petitioner should be estopped to complain about any alleged lack of notice of the entry of the decree. His delay amounted to a waiver. These facts set forth above and others following appeared in the references to the record and in the exhibits attached to the renewal of the respondent's motion to dismiss in the Court of Appeals, were uncontradicted there by petitioner and taken as undenied, *MacFarland* v. *Poulos*, 32 App. D. C. 558, p. 561; *American Wood Paper Co.* v. *Heft*, 131 U. S. XCII.

Thus the trial court properly made and filed its findings of fact and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure (Tr. 32, 34; Exhibit C, R. 27, 28). It properly settled the form of the judgment and directed that it be entered by the clerk in accordance with Rule 58 (R. 5). The clerk properly noted the judgment in the Civil Docket on May 7, 1940 in accordance with Rule 79 (a) requiring the clerk to note judgments chronologically in the Civil Docket and show the date that

notation was made (R. 1). The judgment was then entered and it was effective for all purposes from that time on, Rule 58.

The Rules of the United States Court of Appeals for the District of Columbia, promulgated December 16, 1936 and in effect until January 31, 1941, provided that no judgment of the District Court could be reviewed by the Court of Appeals unless the appeal was taken within the twenty day period after judgment was made or pronounced. This rule was still in effect after the Federal Rules of Civil Procedure. *Burke* v. *Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, decided April 17, 1940. Rule 10 of the Court of Appeals had the effect of law. *Ex parte Dante*, 228 U. S. 429, 57 L. Ed. 905, 33 S. Ct. 579. There was no statute or rule extending the time for appeal, *Ex parte Dante*. Rule 73 (a) of the Federal Rules of Civil Procedure required the taking of an appeal within the time prescribed by law. There was no provision for extending the time for appeal in Rule 73. *Burke* v. *Canfield*, supra. Rule 6 (b) of the Federal Rules prohibited district courts from enlarging the period for taking an appeal as provided by law. Petitioner's filing of a notice of appeal on June 3, 1940 (R. 1, 5) was after the time for appeal had expired. That petitioner's appeal was too late was undoubted and undisputed.

Analysis of Rule 77 (d).

Rule 77 (d) of the Federal Rules of Civil Procedure provides that immediately upon the entry of judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the Civil Docket of the mailing. It is significant that the last sentence of the rule provides that such mailing is sufficient notice for all purposes for which notice of entry of an order is required by these rules. The alleged failure

of the clerk to serve a notice of the entry of a judgment in the Civil Docket by mail and his alleged further failure to make a note in the docket of the mailing in accordance with this rule would not destroy the effectiveness of the judgment. Rules 58 and 79 (a). Performance of the duty to serve a notice of the entry was not a prerequisite to the effectiveness of the judgment or to the running of the period within which an appeal should have been taken. *Siegel* v. *Margiotta*, 102 Fed. 2d. 525, is a recent case which touches on the problem. See, also, *New Federal Procedure and the Courts* by Holtzoff, 1940, pages 155, 156, note 4; *Rosenberg* v. *Heffron*, 131 Fed. 2d. 80. Compliance with Rules 58 and 79 (a) was sufficient to make the entry of judgment effective for all purposes in this case. The judgment was appealable according to Rule 54 (a).

Rule 77 (d) cannot be said to be the same as Equity Rule 4 as contended by petitioner. The wording is distinctly different. It is interesting to recall that the old equity rules in existence prior to November 4, 1912 provided in Rule 4 that, except in cases where personal or other notice was especially required or directed, entry in the order book was sufficient notice to the parties and their solicitors. See comment, 28 U. S. C. A. Sec. 723. For whether the District of Columbia was governed by these Federal Equity Rules see *Curriden* v. *Middleton*, 232 U. S. 633, 34 S. Ct. 458, 58 L. Ed. 765. Compare *Shaw* v. *Lane*, 47 App. D. C. 170.

The Federal Rules of Civil Procedure marked a great advance in court procedure and were intended to liberalize with a view to having cases disposed of at one trial fairly and expeditiously, not to plague the parties, the courts, the bar and the public with uncertain and long delayed justice because of mere technicalities. For instance, Rules 4 and 5, which liberalized methods of service, stated that failure to make proof of service was not fatal. It is interesting to note that Rule 4 (h) allowed proof of service to be amended

at any time. In view of the absence of any such provision in Rule 77 (d) it is apparent that the duty to mail and place a note in the docket of the mailing have no effect on the proceedings in a case. Since notice had been prepared for mailing as signified by the clerk's placing an "X" in the Day Book (Statement supra), this Court can see that under Rule 60 (a) the Civil Docket should be considered as automatically containing this "X" beside the entry of the decree of May 7, 1940. For further comparison, notification of the filing of an appeal should be mailed by the clerk according to Rule 73 (b), but his failure to do so would not affect the validity of the appeal.

The Device.

Petitioner seized upon the failure of the clerk to place the "X" in the Civil Docket to attempt to upset a final determination of litigation. He deserved the prize popcorn whistle of the year, which he mentions on page 13 of his brief for certiorari.

Upon learning that the appeal he noted June 3, 1940 (R. 1, 5) was too late, petitioner in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the clerk to notify parties. This was on June 6, 1940 (R. 6). Respondent opposed this motion in amended points and authorities filed June 7, 1940 (Tr. 39). The trial court requested petitioner to withdraw the motion, which was not done (Exhibit C, R. 27, 29). It remained on the motions calendar and was called for hearing for the first time before Justice O'Donoghue of the District Court. This judge entered an order on June 24, 1940 dismissing the motion (R. 10). The notation of the order was entered in the Civil Docket (R. 1) in accordance with Rules 79 (a) and 77 (d).

Meanwhile the trial court, in order to give respondent an opportunity to note an appeal, entered an order vacating

the judgment of May 7, 1940 on the grounds that the clerk failed to serve a notice of the entry of the judgment by mail on the petitioner and to make a note in the Civil Docket of the mailing (R. 7). This order was filed on June 13, 1940 (R. 1, 7), after the expiration of the time for appeal from the final judgment entered on May 7, 1940 (R. 5). The trial court then filed on June 13, 1940, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940 (R. 7). This took place after the time for appeal had expired. Respondent had no notice or knowledge of this ex parte maneuver until after it had occurred (Exhibit C, R. 27, 29). Petitioner suddenly finding virtue in promptness noted an appeal on June 14, 1940, from this second judgment in the case (R. 8). The prohibition of Rule 6 (b) against the District Court's enlarging the period for the noting of an appeal as provided by law was absolute. It was not to be circumvented by the device of vacating the original judgment and reentering the judgment as of a later date. Petitioner, on page 2 of his petition for certiorari, admitted taking part in this ex parte proceeding by preparing the order vacating the judgment. No notice or motion had been filed to accomplish this (Exhibit A, R. 26, R. 1) and it came as a complete surprise to respondent (Exhibit C, R. 27, 29). The device did not cure the failure to comply with Rule 73 (a) requiring the filing of a notice of appeal from the original judgment within the time prescribed by law. The law mentioned in Rule 73 (a) was in this case Rule 10 of the Court of Appeals and the twenty days for appeal ran from the entry of the judgment of May 7, 1940, which had been entered in the Civil Docket in accordance with Rules 58 and 79 (a). The recitation in the grounds of the order of vacation that the clerk had failed to mail notice of entry of judgment and make a note in the docket of the mailing disclose on the face of the record the nullity of the action (R. 7), since Rules 58 and 79 (a) had

been complied with. In *Freid* v. *McGrath*, 76 U. S. App. D. C. 388, 133 Fed. 2d. 350 the order granting a motion for a new trial disclosed the fallible reasons of the trial court. The second judgment was void and beyond the jurisdiction of the court in the case at bar.

The omission of the clerk to mail the notice of entry of judgment, if it be assumed there had been such omission, and the omission to make a note in the docket of the mailing was not a clerical mistake in the judgment itself within Rule 60 (a). This rule did not contemplate enlarging the time for appeal. That such was the intention of the trial court was demonstrated by its later statement in open court on hearing respondent's motion to reconsider its action (R. 8, Tr. 44) that having been the judge to decide the merits of the case it did not wish to be in the position of cutting petitioner off from an appeal from its decision (Exhibit B, R. 27). The trial judge apparently did not think that the district court ought to have such power in its hands. A mere correction of a clerical error did not extend the time for appeal. See *Sterrett* v. *Shoemaker*, 47 App. D. C. 455. The spirit of the Federal Rules of Civil Procedure is to achieve finality of litigation. Rule 59, subdivisions (a), (b), (c) and (d) strive for this by limiting not only parties but judges as well. *Fried* v. *McGrath*, supra. See for the analogous rule in appellate proceedings *Burke* v. *Canfield*, supra, in which the opinion urged the courts and bar to recognize that infinite mischief results from violation of rules limiting time. Rule 61 directs that no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for setting aside a verdict or for vacating or otherwise disturbing a judgment unless refusal to take such action appears to be inconsistent with substantial justice. All throughout is demonstrated a strong policy for finality and limitation on the power of a court to keep litigants indefinitely under the cloud of a law

suit. Rule 60 (a) contemplates correction of clerical mistakes, oversights or omissions in judgments, orders, or other parts of the record by penmanship and mechanical means. Such a correction would not create new substantial rights, but would merely make the record disclose what in fact had transpired.

There was no motion before the trial court to vacate the judgment or relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect within Rule 60 (b), nor did the trial court's order vacating the judgment make such a finding (R. 7, Exhibit C, at R. 27, 29). Petitioner did not explain why he failed to file additional findings, nor did he allege that he had been surprised or neglectful, mistaken or inadvertent. He chose to rely on the mistake of the clerk.

The opinion of the Court of Appeals (R. 33, 36) expressly found that there was no motion under Rule 60 (b) to relieve a party or his legal representative from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. Compare Rule 55 (c) for setting aside a default judgment for good cause shown or for reasons in accordance with Rule 60 (b). There was no default judgment. Petitioner was the plaintiff below and had his full day in court. Petitioner chose to instigate and carry out the summary method of attempted enlargement of the time for appeal rather than state his reasons for relief under Rule 60 (b) with an opportunity for all to partake in an open hearing. The respondent sought to obtain a reconsideration (Tr. 44, R. 8) to no avail. No blame can attach to respondent. It is too late to rectify these irregular and invalid proceedings initiated by petitioner and he is bound by them.

On the facts of this case it was not necessary to decide whether or not proceedings under Rule 60 (b) could result

in an enlargement of the time for noting an appeal. However, it is clear that this rule cannot be used for the purpose of enlarging the period for appeal. Rule 73 (a), directing the method for appealing from a judgment, stipulates that a party may appeal within the time prescribed by law. The Federal Rules of Civil Procedure have mentioned appeals often, but have not provided for enlarging the period for taking an appeal in any place where appeals are mentioned, nor anywhere in the rules. The omission to do so is very significant and prohibition of this power to the district courts was made absolute by Rule 6 (b) with no exceptions. It is interesting to note that Rule 32 (b) (2) of the General Rules of the United States Court of Appeals for the District of Columbia, effective February 1, 1941, 72 App. D. C. 425, incorporated the prohibition of said Rule 6 (b) against the extension of time for noting an appeal.

Under the California Civil Code, which was a guide for the Federal Rules of Civil Procedure, it has been held that no notice need be given of the rendition or entry of judgment in order to start the statute of limitations running against the time for appeal. *Lawson v. Guild*, 215 Cal. 378, 10 P. 2d 459; *Schainman v. Kierce*, 199 Cal. 249, 248 P. 905; *Palomar Refining Co. v. Prentice*, 47 Cal. App. 572, 118 P. 2d 322. A comparison may also be made between Section 473 of the California Civil Code and Rule 60 (b). In *Vale v. Maryland Casualty Co.*, 101 Cal. A. 599, 281 P. 1058, a motion to vacate a decree on the grounds of surprise was filed and denied. The order denying the motion was vacated the same afternoon "*ex parte and without notice to the adverse party or his attorney.*" That decision, as did the opinion of the Court of Appeals in the instant case, declared the order of vacation clearly void. The California cases and innumerable federal and state cases declare that the time for appeal is jurisdic-

tional and should not be extended. *Williams v. Long*, 130 Cal. 58, 62 P. 264. Compare *In Re Andrew's Guardianship*, 17 Cal. 2d 500, 110 P. 2d 399.

Application of Decisions of This Court.

The Court of Appeals properly applied two cases of this court to the attempted action of the trial court to extend the time for noting the appeal. In *Credit Co. v. Ark. Central Ry.*, 128 U. S. 258, this court held that the use of a *nunc pro tunc* order was ineffective to arrest or call back the time for taking an appeal which had expired; it could not make a dead letter of the law limiting the period for appeal. The trial court in the instant case vacated its judgment after the twenty day period for appeal had expired and reentered it as of a later date so that petitioner could note his appeal from the later judgment. With such a record as exists in this case it would be difficult to think of a situation that called forth more strongly for the application of the rule of that case. The case of *Brooks v. Norris*, 11 How. 204, 52 U. S. 204, granted a motion to dismiss where it appeared of record that the writ of error was not issued until after the expiration of the five year period allowed from the day of the judgment for bringing writs of error. This court upheld the granting of a motion to dismiss by the Court of Appeals of the District of Columbia for failure to note an appeal within the twenty days provided by Rule 10. *Ex Parte Dante, supra.*

The situation was analogous to that in the case of *United States v. East*, 80 Fed. 2d 134, citing *Credit Company v. Ark. Cent. Ry.*, supra. The court held that the action of the trial court in granting a rehearing, after the time for appeal from the judgment had expired, for the purpose of relieving counsel for the government from his error in not placing certain records in evidence necessary for appeal,

and then entering another order denying the claim as of a later date was ineffectual to extend the time for appeal. The East case was cited with specific approval in *Wayne Gas Company v. Owens Company*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, Note 12, where this court stated that if it appears that rehearing has been granted only for the purpose of extending the time for appeal the appeal must be dismissed.

Since petitioner did not request and the District Court did not see fit to order a rehearing of the case on the merits or substantially alter the findings or decision on the merits, there was no tolling of the running of the appeal period. There was no power to toll or call back the appeal period as was done in the bankruptcy case of *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177. In *Gersing v. Chafitz*, — App. D. C. —, 133 F. 2d 384, the court referred to the *Bowman* case as decided prior to the Federal Rules of Civil Procedure and said that, assuming without deciding that under the Federal Rules of Civil Procedure an untimely petition for rehearing of the merits stays the running of the period for appeal, the appeal was too late in any event upon expiration of the time calculated for appeal from the denial of the motion for new trial. The *Bowman* case was distinguished as applicable only to bankruptcy cases arising prior to the New Federal Rules of Civil Procedure in *Safeway Stores Inc. v. Coe*, — App. D. C. —, 136 F. 2d 771. The court decided the assumed question in the *Gersing* case, supra, namely, that the filing of a petition for rehearing after the time for appeal had expired was ineffective to start a new appeal period although the trial court considered the petition before denying it. The court found that Rule 59 (b) of the Federal Rules of Civil Procedure limits the time for filing petitions for rehearing as well as motions for new trial and that Rule 6 (b) was an absolute

prohibition against extending the time. The case of *Leishman v. Associated Wholesale Electric Co.*, 87 L. Ed. 495, — U. S. —, — S. Ct. —, is distinguishable, for in that case there was a timely motion in the district court to alter in substance the court's findings of fact on the merits of the case, not an ex parte proceeding after the time for appeal attempting to use the correction of a clerical error to extend the time for appeal. The opinion in the Leishman case carefully avoided application of its decision to a purely mechanical or formal amendment to the findings. See *Department of Banking v. Pink*, 87 L. Ed. 218, — S. Ct. —, — U. S. —.

Conclusion.

Respondent's renewal of the motion to dismiss for failure of petitioner to note his appeal within time was properly granted by the United States Court of Appeals for the District of Columbia. There was statutory authority for promulgation of its Rule 10. The decision was a correct interpretation of the Federal Rules of Civil Procedure in relation to the facts of this case. It is respectfully argued that the decision should be affirmed.

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